IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

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JUDGMENT

State of Rajasthan
vs
Swaroop Singh & Anr.

S.B. CRIMINAL APPEAL NO.70/1988 AGAINST THE JUDGMENT DATED14.7.1987 PASSED BY THE ADDL. DISTRICT & SESSIONS JUDGTE, BARMER IN SESSIONS CASE NO.5/87.

DATE OF ORDER : 28th July, 2006

PRESENT

HON'BLE MR.MOHAMMAD RAFIQ,J.

Mr.Rameshwar Dave, Public Prosecutor, for the appellant.
Mr. Doongar Singh, Advocate, for the accused-respondents.

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BY THE COURT: -

This appeal has been preferred by the State of Rajasthan against the judgment dated 14th July, 1987 passed by the learned Addl. District &

Sessions Judge, Barmer whereby he acquitted both the accused-respondents from the charges under Section 17, 18 and 21 of the Narcotic Durgs & Psychotropic Substances Act (in short N.D.P.S. Act).

I have heard the arguments of Shri Rameshwar Dave, Public Prosecutor appearing for the appellant-State of Rajasthan and Shri Doongar Singh for the respondents-accused.

The facts of the case are that on 20.7.1986, the Superintendent of Police, Barmer received an information at 10 P.M. that towards north of village Pithakar smugglers have concealed Heroine brought from Pakistan. On receiving this information, the Superintendent of Police along with Dy. Superintendent of Police reached at village Pithakar. They traced footprints of Camel going towards north.

On 21.7.1987, at 9 P.M. they reached *Dhani* of Mangal Singh Soda, towards north of this *Dhani* where the footprints of Camel and pedestals going towards north. They followed and reached near the

herb of Care, where they found one person removing sand to form dig. Two polythene bags were lying near him. On seeing the police party coming, he attempted to run away. He was asked to hands-up, whereby he surrendered. He was asked about the polythene bags. He told his name to be Swaroop Singh son of Shri Ranjeet Singh and further told that there was heroine in the polythene bags. One of the bags containing 27 packets and other bag containing 25 packets. Some matter was printed in the Urdu language on the packet. One packet was taken from each bag, opened and samples were taken and sealed. Thereafter, bags were also sealed.

After conclusion of the investigation, the challan was filed against the accused-respondents Swroop Singh and Hameera for the offences under Sections 17, 18 and 21 of the N.D.P.S. Act. Upon conclusion of trial, the trial court acquitted bo the accused from the aforesaid charges and hence the State has preferred the present appeal before this Court.

Shri Rameshwar Dave, learned Public Prosecutor

has argued that the accused Swroop Singh was found in possession of 52 Kgs. heroine while he was trying to conceal the same near the bushes. His argument is that the factum of recovery of contraband article has been proved from the statement of PW-1 Bhagwan Das, PW-2 Punjraj Singh and PW-3 Govind Narayan Purohit. The trial court has found minor contradictions in the statements and has given the benefit of doubt to the accused-respondents. He has argued that once when the possession of the Heroine and its recovery from the accused was found proved, the burden shifted to them to show as to how they came in possession of the same. It has been argued that the trial court was not justified in disbelieving the prosecution case. Merely because independent witnesses were not produced, the statement of Police personnels cannot be disbelieved. He in this connection relied upon the decision of the Bombay High Court delivered in the case of Kusta Balsu Kandnekar Vs. State reported in 1986 Crl. L.J. 662. He has argued that even if the police witnesses were examined as Motbirs, their testimony cannot be disbelieved because they had no enmity with the accused-respondents,

particularly, when this question was specifically put to the accused and they have denied having any enmity with the police personnels. He has argued that the contraband articles on chemical examination was found to be heroine. Evidence has come on record that accused Swroop Singh was carrying this heroine to deliver it to accused Hameera and a letter to this effect was also recovered at the instance of Swroop Singh from the '*Pilan*' of the Camel. If the police party had not intercepted the accused Swrooop Singh, the contraband Heroine would have definitely given to Hameera. It has therefore been submitted that the learned trial court has committed error of law in acquitting the accused-respondents. The impugned judgment therefore may be set aside and the accused-respondents be convicted of the aforesaid offences.

On the other hand, Shri Doongar Singh, learned counsel for the accused-respondents has supported the judgment of the trial court and has argued that even though accused-respondents were charged for the offence under Section 17, 18 and 21 of the N.D.P.S. Act for allegedly possessing huge

quantity of heroine, the same has not at all been produced at the time of trial of the case. The prosecution has not even examined any witness to show that the contraband heroine was kept in *Malkhana*. So far as case of Hameera is concerned, the learned Public Prosecutor representing before the trial court, categorically accepted that there was no evidence against him and, therefore, the appeal to the extent of Hameera deserves outright rejection. Even though the prosecution has alleged that recovery of the heroine was made form the place adjacent to the *Dhani* of Mangal Singh, but Mangal Singh has not been cited as motbir witness to the recovery of such heroine nor any other independent witnesses have been examined from adjoining *Dhanis*. Both the motbirs witnesses,namely, PW-1 Bhagwan Das and PW-2 Punjraj Singh are Police personnels and independent witnesses have not been associated in the recovery proceedings despite their availability. The prosecution has not examined the Superintendent of Police Shri Satya Narayan Jain, who is said to have accompanied the police party at the site of recovery in spite of several opportunities were granted to the prosecution by

the trial court. He has cited the contradictions in the statements of PW-1 Bhagwan Das, PW-2 Punjraj Singh and PW-3 Govind Narayan Purohit, which has been noticed by the trial court at page no.6 of the judgment. He therefore argued that the trial court was completely justified in acquitting the accused-respondents because the prosecution utterly failed to prove the charge against the accused-respondents beyond reasonable doubt.

Shri Doongar Singh, learned counsel for the respondent-accused has heavily relied upon the judgment of the Hon'ble Apex Court delivered in the case of Jitendra & Anr. Vs. State of M.P. reported in AIR 2003 SC 4236. In the case before the Hon'ble Apex Court also, the prosecution failed to produce seized articles, which was *Chars* and *Ganja* during trial and there was no explanation whatsoever for not producing the same. The Hon'ble Apex Court in that case while setting aside the judgment of the learned trial court as well as the High Court allowed the appeal of the accused and acquitted him. Shir Doongar Singh, learned counsel for the respondents-accused has

also placed reliance on another judgment of the Hon'ble Supreme Court delivered in the case of Koluttumottil Razak Vs. State of Kerala reported in 2000(10) SRJ 477 and with the help of the said judgment, it has been argued that in the absence of independent witness to corroborate the evidence of police officers, the conviction cannot be solely based on the mere ipse dixit of the police personnels. Shri Doongar Singh also drew my attention towards the judgment dated 2.6.2004 of this Court in S.B. Criminal Appeal NO.448/2003. In this case also while relying upon the judgment of the Hon'ble Apex Court delivered in the case of Jitendra (supra), this Court acquitted the accused-appellant from the offence under Section 8/21 of the N.D.P.S. Act for non production of the seized articles in the court. Shri Doongar Singh has also placed before me a copy of the order dated 7th July, 2000 7.7.2006 in which the Hon'ble Apex Court rejected the Petition for Special Leave to Appeal (Criminal) No.6685/2005 filed against the aforesaid judgment of this Court.

I have given my thoughtful consideration of the arguments raised by learned counsel for the

parties and perused the record.

In the present case, the prosecution has not produced any independent witness to prove the recovery of the contraband heroine. PW-1 Bhagwan Das and PW-2 Punjraj Singh who have been produced to prove the recovery are both the police personnels. Although the evidence given by the police personnels in every case may not necessarily be disbelieved, but in the facts of the present case, when the prosecution had opportunity to cite Mangal Singh from close vicinity of whose *Dhani* recovery of the contraband articles was made and who has been actually examined as PW-16. Shri Saidan who was associated by the police party and whose services were taken by the police party for identifying the Pugmark of the Camel has not been retained as witness of the recovery, even though according to the statement recorded under Section 161 Cr.P.C. he was associated with recovery proceedings. The only explanation given by the prosecution for non-associating Shri Mangal Singh as witness of the recovery is that since he was in close relation of accused-respondent Swroop Singh, he was not

retained as motbir. However, PW-16 Mangal Singh who has in fact been examined, in his statement categorically denied having any relationship with accused Swroop Singh. It would be evident from Ex.P/4, which is site plan wherefrom recovery of heroine was made, this place is shown close to the *Dhani* of Mangal Singh and if Ex.P/10 is examined it becomes further evident that this *Dhani* is situated adjacent to the *Dhani* of Keshav Das. It therefore becomes clear that other independent witnesses were also available close to the place of recovery, but instead of examining them, the prosecution choose to associate only police personnels as witnesses of the recovery.

Apart from above, one major and glaring lacuna in the case of prosecution is failure to produce the contraband articles, which is alleged to have been recovered at the instance of the accused-respondents at the time of trial. Not only they have not produced such material object, but they have also not given any explanation whatsoever for its non-production and has relied on solely on the samples taken from such contraband heroine, which was sent to FSL for examination.

The Hon'ble Supreme Court in the case of Jitendra & Anr (supra) observed as under:-

> "5. The evidence to prove that charas and ganja were recovered from the possession of accused consisted of the evidence of the police officers and the panch witnesses. The panch witnesses turned hostile. Thus, we find that apart from the testimony of Rajendra Pathak (PW7), Angadsingh (PW8) and Sub-Inspector D.J. Rai (PW6), there is no independent witness as to the recovery of the drugs from the possession of accused. The charas and ganja alleged to have been seized from the possession of the accused were not even produced before the trial Court, so as to connect it with the samples sent to the Forensic Science Laboratory. There is o material produced in the trial, apart from the interested testimony of police officers, to show that the charas and ganja were seized from the possession of the accused or that the samples sent to the Forensic Science Laboratory were taken from the drugs seized from the possession of the accused. Although, the High Court noticed the fact that the charas and ganja alleged to have been seized from the custody of the accused had neither been produced in the Court, nor marked as articles, which ought to have been done, the High Court brushed aside the contention by observing that it would not vitiate the conviction as it had been proved that the samples were sent to the Chemical Examiner in a properly sealed condition and those were found to be charas and ganja. The High Court observed, "non-production of these commodities before the Court is not fatal to the prosecution. The defence also did not insist during the trial that these commodities should be produced." The High Court relied on Section 465 of

> the Cr.P.C. to hold that non-production of the material object was a mere procedural irregularity and did not cause prejudice to the accused.
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> 6. In our view, the view taken by the High Court is unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchanama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act."
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> (emphasis supplied)

In view of the above, I find no reason not to follow the aforesaid law enunciated by the Hon'ble Apex Court in the circumstances of the present case wherein also the prosecution has failed to prove the seized articles.

As a result of the aforesaid discussion, the present appeal fails and is hereby dismissed.

(MOHAMMAD RAFIQ), J.

c.p.goyal/-